IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.74 OF 2006

IN

NOTICE OF MOTION NO.4209 OF 2005

IN

L.C.SUIT NO.4585 OF 2005

ALONG WITH

CIVIL APPLICATION NO.83 OF 2006

Girnar Apartment Co-op.Hsg.Scty.Ltd....Appellants

Versus

Mrs.Sushilarani Baburao Patel

& Ors. ...Respondents

.....

Mr.P.K.Dhakephalkar with Mr.Shishir Joshi for Appellants.

Mr.Janak Dwarkadas with Mr.Chirag Balsara & Mr.Abhinandan Vagyani i/b Divya Shah & Associates for Respondents 2 to 12.

Mrs.Joglekar for Respondent No.13.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 1, 2006.

P.C.

1. Heard Counsel for the parties. Perused the relevant record.

2. This Appeal from Order takes exception to the Order passed by the City Civil Court, Greater Bombay dated 20th December 2005 refusing to grant ad-interim relief as prayed for by the Appellants during the pendency of the Suit.

3. At the outset, it needs to be mentioned that the Respondents/Defendants have raised plea of jurisdiction. The Trial Court has formulated preliminary issue on pecuniary jurisdiction of that Court and has observed that, that issue will be tried before any final orders were to be passed on the Notice of Motion.

4. Indeed, by virtue of Section 9A of the Code of Civil Procedure, even while deferring passing any final order on the Notice of Motion for temporary injunction because of raising of issue of jurisdiction, the Trial Court will be within its jurisdiction to consider prayer for ad-interim relief. In this backdrop, Appellants prayed for

ad-interim relief before the Trial Court. Counsel for the Appellants fairly accepts that the limited ad-interim relief which was sought before the Trial Court was for appointment of the Commissioner to ascertain the position whether the flats in question are physically occupied, so that, appropriate orders could be passed at the time of final hearing of the Notice of Motion.

5. The Court below by the impugned order has refused to grant that relief on the reason that the stand of the Defendants appears to be that the construction is already completed and occupation certificate as well as completion certificate has been issued by the Defendant No.13, as a consequence of which, Defendants 2 to 12 have already handed over possession of the respective flats to the concerned purchasers.

6. Mr.Dhakephalkar for the Appellants contends that the fact asserted by the Respondents that possession of the respective flats have been made over to the purchasers is not substantiated. This submission overlooks that on affidavit,

Defendants have in paragraphs 51 and 52, asserted that possession of the respective flats have been made over to the concerned purchasers. At this stage of the proceedings, there is nothing on record to controvert that position.

7. To get over this position, Counsel for the Appellants would contend on the lines argued before the lower Court that the factum as to whether flats are physically occupied by the respective purchasers will have to be ascertained, so that, appropriate directions can be passed at the time of final disposal of the Notice of Motion.

8. I am in agreement with the view expressed by the Court below that whether the flats are physically occupied by the concerned purchasers, cannot be the basis to decide the point in issue. It is enough if the Defendants have already parted with possession, which fact is stated on affidavit. Unless that fact is countered and decided, the question of entertaining any other argument on behalf of the Appellants will not arise. The core issue in the suit instituted before the Court below

is that of Defendants 2 to 12 utilising the TDR available in respect of plot belonging to the Appellants/Plaintiffs. That issue indeed will have to be considered at the appropriate stage.

9. For the time being, suffice it to observe that no fault can be found with the order which is impugned in this Appeal from Order declining to grant ad-interim relief in favour of the Appellants of appointment of Commissioner as was prayed. Hence, this Appeal should fail. The same is dismissed.

10. It is, however, made clear that the Trial Court will proceed to decide all the issues either arising in Notice of Motion or the Suit on its own merits in accordance with law, uninfluenced by any observations made in the impugned order or for that matter, the present order. The Trial Court shall ensure that the preliminary issue is decided as expeditiously as possible, preferably by the end of April 2006.

11. At this stage, Mr.Dhakephalkar contends

that at least an observation be made that all steps taken by Defendants 2 to 12 after the institution of the Suit will be subject to the outcome of the proceedings pending before the Trial Court. In my view, it is not necessary to make such observation. If the Plaintiffs/Appellants were to claim appropriate relief in that behalf, the Court at the relevant stage, will consider that relief on its own merits.

12. Appeal and the cognate Civil Application disposed of on the above terms.

A.M.KHANWILKAR, J.